

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2009 AUG 27 PM 2:35
JEANNE HICKS, CLERK
BY: V. Rosa

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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF YAVAPAI**

11 JOHN B. CUNDIFF and BARBARA C.
12 CUNDIFF, husband and wife; ELIZABETH
13 NASH, a married woman dealing with her
14 separate property; KENNETH PAGE and
15 KATHRYN PAGE, as Trustee of the Kenneth
16 Page and Catherine Page Trust,
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18 Plaintiffs,
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20 v.
21
22 DONALD COX and CATHERINE COX,
23 husband and wife,
24
25 Defendants.

Case No. CV 2003-0399
DIVISION 1
**ANSWER TO PLAINTIFFS' SECOND
AMENDED COMPLAINT**

(Assigned to the Honorable David L. Mackey)

26 Defendants Donald Cox and Catherine Cox, husband and wife ("**Defendants**"), by and
27 through undersigned counsel, and in response to Plaintiffs' Second Amended Complaint
28 ("**Complaint**") hereby admit, deny and allege as follows:

29 **PARTIES, JURISDICTION AND VENUE**

30 1. Defendants admit Paragraphs 1-4 of the Complaint.

31 **CLASS ACTION ALLEGATIONS**

32 2. Answering Paragraph 5 of the Complaint, Defendants reallege and incorporate by
33 reference their answers to Paragraphs 1-4 of the Complaint as if each were fully set forth herein.

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3. Defendants deny Paragraphs 6-9 of the Complaint. Further answering Paragraphs 6-9, Defendants deny that Plaintiffs are proper representatives of all owners of property in the subject subdivision and assert that they will not adequately represent the interests of all owners of property in the subject subdivision as many members of the purported class will have legal, equitable and factual positions that vary significantly from those of Plaintiffs. This is no more evident than from the fact that Plaintiffs' former counsel, David K. Wilhelmsen, has filed suit against several other subdivision property owners in Yavapai County Superior Court Case Nos. CV2009-0816 and CV2009-0822 alleging violations of the subject Declaration of Restrictions. Accordingly, while Defendants believe all of the owners of property in the subject subdivision should be parties to this case (and as this Court has already ordered joinder), Defendants deny that Plaintiffs should be designated as class representative for all subdivision property owners and deny that this case should be certified as a class action.

4. Answering paragraph 10 of the Complaint, while Defendants admit that the prosecution of separate actions by the owners of property within the subject subdivision could result in varying results and inconsistent obligations of the owners of those properties, Defendants assert that the actual joinder of all owners not currently parties is and was the appropriate manner in which to proceed, which is exactly what this Court found and ordered. Further answering paragraph 10 of the Complaint, Defendants deny that class certification is appropriate or warranted and deny the remaining allegations therein.

5. Defendants deny Paragraphs 11-12 of the Complaint.

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15. Defendants deny Paragraphs 24-27 of the Complaint.

Count I – Breach of Contract

16. Answering Paragraph 28 of the Complaint, Defendants reallege and incorporate by reference their answers to Paragraphs 1-27 of the Complaint as if each were fully set forth herein.

17. Defendants deny Paragraphs 29-30 of the Complaint.

18. Defendants deny each and every allegation in Count I the Complaint not expressly admitted herein.

19. Defendants deny that Plaintiffs are entitled to any of the relief or remedies requested in Count I of the Complaint or to any relief or remedy of any kind whatsoever.

20. Defendants are entitled to an award of their reasonable attorneys' fees incurred in defending against Count I of the Complaint pursuant to A.R.S. §§ 12-340, 12-341.01 and 12-349.

Count II – Breach of Contract

21. Answering Paragraph 31 of the Complaint, Defendants reallege and incorporate by reference their answers to Paragraphs 1-30 of the Complaint as if each were fully set forth herein.

22. Defendants deny Paragraphs 32-33 of the Complaint.

23. Defendants deny each and every allegation in Count II the Complaint not expressly admitted herein.

24. Defendants deny that Plaintiffs are entitled to any of the relief or remedies requested in Count II of the Complaint or to any relief or remedy of any kind whatsoever.

Count II – Breach of Contract

25. Answering Paragraph 34 of the Complaint, Defendants reallege and incorporate by reference their answers to Paragraphs 1-33 of the Complaint as if each were fully set forth herein.

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26. Defendants deny Paragraphs 35-36 of the Complaint.

27. Defendants deny each and every allegation in Count III the Complaint not expressly admitted herein.

28. Defendants deny that Plaintiffs are entitled to any of the relief or remedies requested in Count III of the Complaint or to any relief or remedy of any kind whatsoever.

Count IV – Claim for Declaratory Relief

29. Answering Paragraph 37 of the Complaint, Defendants reallege and incorporate by reference their answers to Paragraphs 1-36 of the Complaint as if each were fully set forth herein.

30. Answering Paragraph 38-40 of the Complaint, Defendants deny that they or their property are subject to or burdened by the Declaration of Restrictions, deny that the Declaration of Restrictions are enforceable and therefore the allegations contained therein.

27. Defendants deny each and every allegation in Count IV the Complaint not expressly admitted herein.

28. Defendants deny that Plaintiffs are entitled to any of the relief or remedies requested in Count IV of the Complaint or to any relief or remedy of any kind whatsoever.

Count V – Request for Injunctive Relief

29. Answering Paragraph 41 of the Complaint, Defendants reallege and incorporate by reference their answers to Paragraphs 1-40 of the Complaint as if each were fully set forth herein.

30. Defendants deny Paragraph 42 of the Complaint.

31. Defendants deny each and every allegation in Count V the Complaint not expressly admitted herein.

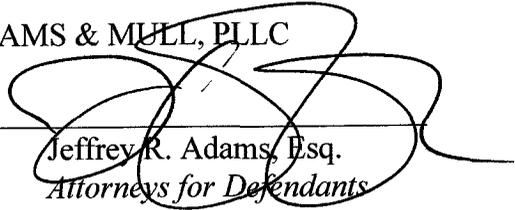
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- A. Denying Plaintiffs' request for class certification;
- B. Dismissing the Complaint with prejudice and ordering that Plaintiffs take nothing thereby;
- C. Awarding Defendants their reasonable attorneys' fees and costs pursuant to A.R.S. §§ 12-340, 12-341.01 and 12-349 and interest thereon at the highest legal rate;
- D. For such other and further relief as the Court deems just and necessary under the premises.

DATED this 27 day of August, 2009.

ADAMS & MULL, PLLC

By



Jeffrey R. Adams, Esq.
Attorneys for Defendants

A copy of the foregoing was hand-delivered this 27 day of August, 2009 to:

The Honorable David L. Mackey
Yavapai County Superior Court
Division 1
Yavapai County Courthouse
Prescott, Arizona

J. Jeffrey Coughlin, Esq.
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Rosemary Dvorak